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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER,
Petitioner,

VERSUS

A. J. SMILER,
Respondent.

RESPONSE TO PETITION FOR REHEARING

JACK M. HIGHLEY,
Mutual Savings Building,
Oklahoma City, Oklahoma;

JOHN B. OGDEN,
1409 Liberty Bank Building,
Oklahoma City, Oklahoma,

By JOHN B. OGDEN,
Attorneys for Respondent.

1961.

TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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In the
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A. J. SIMLER,
Respondent.

RESPONSE TO PETITION FOR REHEARING

Comes now the respondent herein, A. J. Simler, and in accordance with the direction of this Court to respond to the Petition for Rehearing filed herein by the petitioner, shows to this Honorable Court the following:

This involves a suit by the respondent, A. J. Simler, filed against the petitioner, Leslie L. Conner, in the United States District Court for the Western District of Oklahoma wherein Mr. Simler seeks a declaratory judgment asking the Court to determine what fee, if any, additional he owes to the said Conner as attorney fees. The petitioner alleged that he had paid to Mr. Conner the sum of $24,000.00 in cash, $12,800.00 to Mr. James Grigsby, an associate of Mr. Conner, $7,500.00 to John B. Ogden, an attorney who was employed by Mr. Simler to aid Mr. Conner, and that he paid a sum of $46,000.00 as attorney fees to

Fred Suits, Mary Weiss, Dudley, Dudley and Dudley, attorneys who were opposing him in the litigation, but said last sum he was ordered to pay by the County Court of Oklahoma County, Oklahoma, making a total he paid out in attorney fees of $90,300.00, and he alleged further that he asked the Court to adjudge whether or not he is indebted to the said Leslie L. Conner in any sum or sums whatsoever and if so to what extent or what amount. The defendant in that action, the petitioner herein, Leslie L. Conner, filed his answer to the complaint and amended complaint and in his answer he sets out that he was employed by Mr. Simler on July 18, 1952, which employment was evidenced by a letter which Mr. Conner wrote and asked Mr. Simler to sign, which letter is in words and figures as follows, to-wit:

"July 18, 1952

"Mr. Leslie L. Conner, Atty.,
"410-414 Hightower Bldg.,
"Oklahoma City, Oklahoma

"Dear Sir:

Re: Birdine Fletcher Estate
County Court Oklahoma County,
Oklahoma

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court

reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court of any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler
"A. J. Simler, for himself and his children"

At this time, that is July 18, 1952, the relationship of attorney and client was fixed by virtue of such letter and Mr. Leslie L. Conner became the attorney for Mr. A. J. Simler. This is important in this case because under Oklahoma law, after the relationship of attorney and client exists, no contract can thereafter be made between the attorney and client on account of the fiduciary relationship except for a reasonable fee for services rendered as will be pointed out hereinafter in this response. Mr. Conner then represented Mr. Simler and while such relationship existed and on September 25, 1952, without any consideration whatsoever, Mr. Conner prepared another letter in his office and called Mr. Simler to come to his office

and as the record shows, after much persuasion secured the signature of Mr. Simler on such second letter which second letter is in words and figures as follows, to-wit:

"September 25, 1952

"Mr. Leslie L. Conner
"Conner, Hilpirt & Britton
"Attorneys and Counselors at Law
"410-414 Hightower Building
"Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

This second letter was written completely with the typewriter except the figures "25" following September which was written with pen which we feel indicates the letter was prepared long before Mr. Simler was ever

called to Mr. Conner's office. This second letter was written entirely by Mr. Conner and Mr. Simler had no advice from anyone except Mr. Conner, his own lawyer, concerning the matter. Mr. Simler testified by deposition, which depositions are in this case and in the record, that the only reason he signed the letter of September 25 was because Mr. Conner continued to persuade him to so do; that he knew nothing about what a reasonable fee was and the only information or advice he received was that given to him by Mr. Conner while the relationship of attorney and client existed.

THE OPINION OF THE SUPREME COURT OF OKLAHOMA IN *SOUTHARD* v. *MacDONALD*, DECIDED MARCH 28, 1961, 32 OKLA. BAR ASSOCIATION JOURNAL 609, IS IN NO WISE IN CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT IN THIS CASE.

In discussing this case and for convenience sake we will refer to the case of *Southard* v. *MacDonald* as the *Southard* case. In the *Southard* case the Supreme Court of Oklahoma merely announced the rule with reference to a suit to cancel a deed and in connection therewith we call to the Court's attention the fact that the first paragraph of the opinion by the Supreme Court of Oklahoma is as follows:

> "This was an action by Cynthia Ann Trammell, Robert Lee Southard and Flora Marshall against Frank Southard, Myrtle Carpenter, Bernice Little and D. S. MacDonald, Jr., to partition 420 acres of land. * * *
>
> "Plaintiffs alleged that when they employed MacDonald he assured them that he could break the will of their father, and asked them to sign a contingent

fee contract of 30 per cent of all properties recovered for them, if he broke the will, or nothing if he failed to break the will; that he also asked them to sign another instrument which they were led to believe authorized him to have a guardian appointed for their mother, but which was in fact a warranty deed conveying to him 40 per cent of the value of all property recovered for them."

It will be thus noted that this was a suit to cancel that deed and that the deed and attorney's contract were entered into at the same time and before the relationship of attorney and client existed between D. S. MacDonald, Jr., Frank Southard and his sister, Bernice Little. At that time there was no fiduciary relationship between the parties. They could contract in any way they saw fit. They prayed that the contingent fee contract between them and MacDonald be cancelled and that the Warranty Deed by them to MacDonald be cancelled. The Supreme Court in discussing the question of whether or not this type of action in the *Southard* case is a jury case followed the long established rule in Oklahoma that it is well settled that an action, the primary purpose of which is to set aside a deed conveying real estate and obtaining a decree reinvesting title in plaintiff, is one of equity and in such action neither party is entitled to a jury.

In the case at bar and for consideration here no such question is presented. The question presented here is "What is a reasonable attorney's fee" and Mr. Simler is not asking to cancel anything. He asks the Court in a declaratory action to declare what is a reasonable fee and whether or not he has paid a reasonable fee to his attorney Mr. Conner.

We call to the Court's attention the case from the Oklahoma Supreme Court which is mentioned in the *Southard* opinion, being *Hausstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, in which the Supreme Court of Oklahoma used the following language:

"Syllabus by the court.

* * * * * * *

"2. Contracts between attorney and client, to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just, and equitable, and even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price. * * *"

We quote further from this same case as follows:

"The main issue involved in this case was whether a new contract of employment was made between the parties. Plaintiff claimed that he turned this money over to defendant to be used in paying all claims listed in the bankruptcy matter, and that the residue, if any, remaining after paying said claims was to have been returned to him. Defendant contended that a new contract of employment had been made between himself and the plaintiff by which the plaintiff was to place in his hand the sum of $3,500, and that out of this sum the defendant was to pay the Hubbard judgment, which amounted to $1,115, and the balance was to be retained by defendant as attorney's fee for closing the bankruptcy proceedings and for defending the threatened criminal prosecutions. The jury, by their verdict, decided the issue in favor of the defendant, as to the existence of the new contract, but

awarded the plaintiff judgment for the sum of $1,259.15 instead of the sum prayed for in his petition.

"This instruction as a whole embodies a fair statement of the law applicable to this case. It is as follows: 'You are instructed that as an affirmative defense herein, the defendant pleads and contends that the $3500.00 was paid to and received by him on November 5th, 1929, under a second and separate employment contract between the plaintiff and the defendant, whereby defendant alleges, it was agreed that the defendant was to first pay out of said money, the principal, interest and costs of said Ella Hubbard judgment and the costs of said bankruptcy proceedings, and that the remainder was to be retained and kept by the defendant as a fee and compensation for the defendant for services thereafter rendered by defendant and said Lee Gray in representing plaintiff in any action, civil or criminal, arising out of said bankruptcy proceedings, and that said sum was reasonable compensation therefor. If you find from the evidence that at the time said second, separate and new contract is alleged to have been made, that the relation of attorney and client existed between plaintiff and defendant, then, in that event, you are instructed that the relationship between attorney and client, after same is established is of the very highest trust and confidence, and that any contract then made for the benefit of an attorney is constructively fraudulent, and the burden is upon the attorney to prove the making of the contract by a preponderance of the evidence and also to prove and show that the contract is fair, just and equitable; and if you find that the defendant, Haunstein, has proved by a preponderance of the evidence that the second and new contract was made by and between plaintiff and defendant as alleged by defendant, and that defendant has also

proved by a preponderance of the evidence that said contract is fair, just and equitable, you will find for the defendant and award defendant reasonable compensation for services rendered after November 5th, 1929, in addition to the services covered by said $150.00 fee paid the defendant to represent plaintiff in said bankruptcy proceedings, as may be shown by the evidence in the case and award judgment for the plaintiff for such sum, if any, as you may find from the evidence to be the difference between the amount retained by defendant after paying said judgment and costs and the amount, if any, you may find from the evidence would be reasonable compensation for any services you may find from the evidence the defendant has rendered under said contract since November 5th, 1929, in addition to the services covered by said $150.00 fee paid the defendant to represent plaintiff in said bankruptcy proceedings. If you find that the defendant has failed to prove by a preponderance of the evidence that said new and second contract alleged to have been made on November 5th, 1929, was made and entered into between the parties, as alleged by defendant, your verdict will be for the plaintiff, and you will award judgment for a sum equivalent to the difference between said $3500.00 and said sums paid out by defendant in settlement of said Hubbard judgment and costs.'

"It is a well-established rule of law that contracts between attorney and client, to the advantage of the attorney, made while such relation exists, are presumptively faudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just, and equitable, and even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price."

It will thus be noted that under the law of Oklahoma that a contract made between an attorney and client, while that relationship exists, is presumtively fraudulent and the burden of proof is upon the attorney to show that such contract is fair, just and equitable and even then he is not entitled to recover more than reasonable compensation for his services *regardless of the contract price.* Consequently, this suit is merely a suit between Mr. Simler as plaintiff in the United States Court asking for declaratory judgment to determine what is a reasonable lawyer's fee, which must be decided under our law by a jury. Actually the question that was presented to the Court of Appeals in this case was an appeal from the District Court to the Court of Appeals wherein the District Court sustained a motion for a summary judgment and the question was whether or not the District Court could sustain such motion under the circumstances.

We wish to call to the Court's attention further the fact that there was no consideration whatever for the second letter which was prepared as heretofore stated by Mr. Conner. Mr. Conner was already employed under the letter of July 18, 1952, to represent Mr. Simler. Consequently, the second letter of September 25 did not require Mr. Conner to do anything more as he was already bound to represent Mr. Simler and therefore there was no consideration whatever for such second letter. This second letter furthermore is a complete nullity and is presumed to be fraudulent under the authority of the *Haunstein* case cited above. It is difficult to understand how Mr. Conner could ask for anything more than a reasonable fee and the letter of July 18, 1952, sets this out in part as follows:

"We also agreed to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered * * *."

Next, we point out particularly to this Court the authority dealing with the sustaining of a motion for summary judgment and presented under the folllowing heading: "Court was without authority to sustain motion for summary judgment."

The Supreme Court of Oklahoma in the case of *Wolfe v. Campbell*, 107 Okla. 112, 230 Pac. 506, said:

"ISSUE AS TO WHAT IS REASONABLE ATTORNEY'S FEE FOR JURY. In such action the issue as to what would be a reasonable attorney fee for services rendered is an issue of fact to be determined by a jury from the evidence. The court further said in an action for specified attorney fee where issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land. In such case, the jury may properly determine the issue of fact and return a verdict for what it finds to be a reasonable fee, the court may then render judgment for the amount of the verdict, and, in the exercise of its equity powers, decree a lien against the defendant's land for the satisfaction of the judgment. The fact that decreeing a lien calls for the exercise of equity powers by the court does not take from the jury the power to first determine the issue of fact as to what fee is reasonable, a determination of the fee being the foundation of the right to a lien."

We quote from the body of the opinion:

"This was a suit for the recovery of a money judgment, $2,000.00 attorney's fee. Under Section 532, C.L.

1921, the amount in controversy being an issue of fact arising in an action for the recovery of money, defendants in error were entitled as a matter of right to a jury verdict. Said Section 532, together with Section 533, id., being the sections of our Code which provide what issues may be tried to a court and what issues as a matter of right must be tried to a jury, unless waived, read as follows:

"Section 532. 'Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.'

"Section 533. 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this Code.'

"Hence the action being for the recovery of money, and the issue as to what amount, if any, should be recovered, being an issue of fact arising out of an action for the recovery of money, it was properly an issue to be determined by the jury, and the testimony as to the value of services being in conflict, plaintiff's attorneys testifying what they were worth, and defendants' attorneys testifying that they were worth less, the jury being judge of the credibility of the witnesses and weight of the testimony, its verdict will not be disturbed, if reasonably supported by the evidence, following the rule in Snyder v. Stribling, 18 Okl. 168, 89 P. 222, and Wallingford v. Alcorn, 75 Okl. 295, 183 P. 726."

In the case of *Opperud* v. *Tweedell*, 175 Okla. 191, 51 P.2d 799, the Supreme Court of Oklahoma speaking on the subject said in the body of the opinion:

> "A comprehensive examination of the evidence introduced in behalf of the plaintiff shows it to be sufficient, if accepted as true, to warrant a conclusion that the plaintiff was employed by the defendant to transact the business of others as well as her own and that the plaintiff had not been paid in full for the services thus rendered, That is, it was sufficient to present a disputed question of fact which should have been submitted to the jury. Whether the jury would accept the evidence and resolve the disputed question in favor of the plaintiff is, of course, an entirely different question."

We call the Court's attention to the following cases:

Bonelli v. *Conrad*, 37 P.2d 137 (Calif.);

Stuart v. *Preston*, 38 P.2d 155 (Calif.);

Humphreys v. *Commerce Trust Co.*, 133 Kan. 498, 1 P.2d 263;

Pierce v. *Rilovick*, 29 P.2d 228 (Calif.).

All of which held that the question of what is reasonable compensation is for the jury and in the case of *McManus* v. *Allan*, 89 P.2d 690, the Court held that in an action for reasonable value of attorney's services whether attorneys were to be paid for the reasonable value of services or upon a contingent basis was a question for the jury. In *Liebenguth* v. *Priester*, 148 P.2d 893 (Calif.), the Court held that it was proper for the jury to fix the amount as a reasonable fee for the attorney. And in the case of *Skeen* v. *Peterson*, 196 P.2d 708, Utah Court speaking, the

Court held that in an action by an attorney for fees, where the client counter-claimed an alleged over-payment that the issue on the defendant's counter-claim was for the jury. It would therefore appear to us that there can be no question but when the issue of attorney fee is involved that under the law of Oklahoma, it is to be determined like any other controversy where there is a question of fact involved. In the case of *C. E. Walker* v. *Edwin A. Ellinghausen*, 309 P.2d 1058, the Court passed upon a question of attorney suing for fees and held that the jury was properly instructed. Although there is no issue raised as to whether it was proper to submit it to the jury but there is complaint as to the form of the instructions. In the case of *McManus* v. *Alan*, 89 P.2d 690 (Calif.), the Court of Appeals said:

> "Syllabus Two (2), by the Editorial Staff. In Action for reasonable value of attorneys' services, whether attorneys were to be paid for the reasonable value of services or upon a contingent basis was for the jury."

We now call to the Court's attention the Oklahoma Statutes. Title 12, Article 552 of said title defines issues as follows:

> "Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds. First, of law; Second of fact."

Article 554 of said Title defines an issue of fact as follows:

> "An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or,

second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be controverted by the defendant without further pleading."

Article 556 of said Title 12 is as follows:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

Cited under said section and footnote 48 were both of the cases heretofore cited in the brief and in all of them the Supreme Court of Oklahoma held that in a suit for attorneys' fees, a jury trial was proper and the parties are entitled to it as a matter of law. Rule 38 of the Federal Rules of Civil Procedure provides for a jury trial of right and provides in part that the right of trial by jury as declared by the 7th Amendment of the Constitution of the United States or as governed by a statute of the United States shall be preserved to the parties inviolate. We wish to call to the Court's attention that the petitioner herein demanded a jury trial at the time he filed his complaint. He demanded a jury trial at the time he filed his reply to answer and cross-complaint. He demanded a jury trial at the time he filed his response to motion for summary judgment.

"The fact that this suit is one brought for declaratory judgment does not in any wise deprive the appellant of a jury trial. This court has so held and so have all courts where the matter has been presented."

See *City of Morgantown, W. Va. v. Royal Insurance Company*, 337 U.S. 254, 69 Supreme Court 1067, 93 Law Edition 1347.

In *Canister Company, et al. v. Leahy, Chief Judge*, 182 F.2d page 510, the United States Court of Appeals, Third Circuit, said:

> "The form of a complaint and the nature of the relief prayed for in it must guide a trial court in its determination as to whether or not a trial shall be to the court or by a jury."

In *Bereslavsky v. Caffey, United States District Judge, Second Circuit*, 161 F.2d 499, the Court said:

> Syl. 3: "In action for patent infringement the plaintiff is entitled to a jury trial where the sole claim is for money and demand for jury is timely."

With reference to a jury trial, we call to the Court's attention, Corpus Juris Secundum 50, page 778, beginning at the top of the inside column. This language is used:

> "Where an attorney's fee is taxable as a part of the costs, the amount of the fee may be determined by the court without a jury. Where there is a dispute over the terms of an agreement as to the fee to be paid, and also where it is provided by statute that in an action for damages plaintiff if successful may recover a reasonable attorney's fee, the amount of such fee must be determined by a jury, and the attorney does not lose the right to a jury trial because he is an officer of the court."

See the following authorities in support of the above:

—*Merritt v. Guthbert Bank*, 143 Ga. 394, 85 S.E. 104;

Cassel v. *Gregoria*, 28 Cal. App.2d Supp. 769, 70 P.2d 721;

Briggs v. *St. Louis & San Francisco Railway Company*, 111 Mo. 168, 20 S.W. 32;

In re: Kennedy, 120 Pa. 497, 14 Atl. 397;

In re: Pearlstein, 120 N.Y.S.2d 63.

Quoting from C.J.S., page 731, Volume 50, under paragraph "Particular Actions":

"The parties have been held entitled to a jury trial of the questions of fact in a great variety of civil actions at law, including actions of assumpsit; actions to recover damages for breach of contract or for fraud or patent infringement or for triple damages, under the Sherman Anti-Trust Law. Also, the guaranty has been held applicable to actions for dower, attorney's fees, commissions, contribution from a joint tort-feasor, goods sold and delivered, * * *

"See Neal v. Drainage Dist. No. 2 of Ada County, 248 P. 22, 42 Idaho 624; In re: Britton's Will, 60 N.Y.S. 2d 466; Western States Oil & Land Co. v. Helms, 288 P. 964, 143 Okl. 206, 72 A.L.R. 357; and Fisher v. Modern Woodmen of America, App., 59 S.W.2d 476; DePass v. Reed Interstate Transfer Assn., 59 S.E. 2d 495, 217 S. Carolina 38."

We wish to call to the Court's attention the case of *Sarton* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 Sup. Ct. 724, 88 L. Ed. 967. The Supreme Court in setting out the requirements for summary judgment said, and we quote:

"Syllabus 7: The credibility of witnesses and weight to be given their testimony is for jury which may

exercise its independent judgment even if such testimony is uncontradicted.

"Syllabus 8: That a witness who is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

We quote further in the body of the opinion:

"There are many things sometimes in the conduct of a witness upon the stand and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which the jury are to be guided in determining the weight and credibility of his testimony. That part of every case such as the one at bar belongs to the jury who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it except in a case of manifest and extreme abuse of their function. * * * We think the defendant failed to show that it is entitled to judgment as a matter of law. In the stipulation, the bulletin, the affidavit of the plaintiff's attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that support plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined after trial, in the regular manner. The judgment accordingly is reversed."

Toebelman, et al. v. *Missouri Kansas Pipe Lines, et al.*, Circuit Court of Appeals, Third Circuit, in discussing summary judgment:

"Syllabus 2: Upon a motion for summary judgment, it is no part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried.

"Syllabus 3: All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."

This announcement by this Court in the body of the opinion said:

"* * * a substantial dispute as to a matter of fact, forecloses summary judgment and restates the opinions announced in the syllabus."

Mr. Simler testified on page 66 of his deposition:

Q. "Upon whose advice did you rely in signing that letter?

A. Well, I had no advice as far as that was concerned excepting that I seemed to take it for granted if Conner drew it up and wanted me to sign it, it was the proper thing to do.

Q. Well, did he advise you to sign it, ask you to sign it?

A. Well, naturally, or I wouldn't have signed it."

Page 65:

Q. "And I said when you signed that letter, did you have an opportunity to talk to anybody except

Conner about it, anybody else, an independent person?

A. No.

Q. All right, are you willing to pay a reasonable fee?

A. Yes sir, I always have been.

Q. And if you have not paid him already you are willing to pay him a reasonable fee?

A. Absolutely."

Without quoting verbatim from Mr. Simler's testimony to summarize it, he had an eighth grade education. He will be eighty-two years old in August of this year and consequently he was seventy-four years old at the time he signed the letter of employment. Quoting from his deposition further (page 9):

Q. "Now you agreed to pay him then a reasonable fee it says here, as I have read for contesting the will. Will you tell the court and jury at this time if you or he mentioned in any way at any time a suit in the Federal Court for the purpose of trying the title or the ability of the Sisters of St. Francis or any of the beneficiaries to take or hold the farm in Caddo County? Was that talked at that time?

A. There was no thought of that whatsoever.

Q. Was it ever even mentioned?

A. Never mentioned.

Q. So this letter was just to contest the will, is that right?

A. That is it."

Quoting further on page 10:

A. "The letter speaks for itself so far as that is concerned, but I will say in addition to that what I hired him for was to break the will.

Q. All right sir. Now, then, was anything else discussed in any way except the breaking of the will?

A. At that time, no.

Q. All right, sir. Now, then, Mr. Simler, would you tell the court and jury whether or not you relied upon the terms of this letter at the time you employed him on July 18, 1952?

A. There was nothing else to rely on that I know of.

Q. All right, sir. Then did you rely on the letter?

A. I relied on the letter.

Q. And employed him upon that basis only?

A. Employed him and his firm."

Quoting further (page 14):

Q. "Mr. Simler, would you tell the court and jury what, if anything, has been your experience or knowledge in connection with lawyer fees or fixing of lawyer fees? What has been your experience with that prior to this time before you got in this litigation?

A. Why, I haven't had any.

Q. All right, sir. Then, did you know when you employed Mr. Conner what was a reasonable fee or wasn't a reasonable fee? You put in there a reasonable fee to be fixed by the court?

A. No, but I trusted in the clause in there that we would, if we couldn't agree on a reasonable fee, it should be left up to the county court.

Q. The court.

A. Or any other court.

Q. All right, sir.

A. So I figured that that way I would be—have a certain amount of protection."

The *Haunstein* opinion, heretofore mentioned and referred to, holds that a letter or a contract secured after the relationship of attorney and client is established is presumptively fraudulent. Under Moore's Practice, Volume 5, page 177, construing Rule 38:

"Where on the other hand the liability has matured and the insurer either brings an action to cancel and the beneficiary counter-claims for recovery on the policy or the beneficiary sues and the insurer defended counter claims for cancellation the basic issue of fraud is triable to a jury."

Ettelson v. *Metropolitan Life Insurance Co.*, 137 F.2d 62; *Garman* v. *Metropolitan Life Insurance Co.*, 175 F.2d 12, on page 178, the same authority and we quote:

"And these principles are equally applicable to an action by the insurer framed along declaratory judgment lines instead of along the formal equitable line of action for cancellation."

Title 15, Oklahoma Statutes Annotated, Article 59. Constructive Fraud Defined. Constructive Fraud consists of:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or

"2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

The Supreme Court of Oklahoma said in substance as follows:

"Actual fraud is a question of fact. Actual fraud is always a question of fact.

"Article 61—

"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

"2. In taking an unfair advantage of another's weakness of mind;

"3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

In *Peckham* v. *Ronrico Corp.*, 171 F.2d 653, First Circuit:

"In suit based on alleged fraud of insolvent debtor in furnishing capital for corporation of which defendants were stockholders, where there was a conflict between first set of affidavits furnished by defendants and their second set and defendants' affidavits were contradicted by the plaintiff's final affidavit, defendants were not entitled to summary judgment."

The judgment was reversed.

In *Doehler Metal Furniture Co.* v. *United States*, 149 F.2d 130, Syllabus 5:

"Trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable."

The Court said in the body of the opinion:

"Trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable. Such a judgment wisely used, is a praiseworthy time-saving device. But although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

Arenas v. *United States,* 88 L. Ed. 1633, quoting further:

"The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered."

—*Sartor* v. *Arkansas Natural Gas Corp.*, 88 L. Ed. 967.

In *Whittaker* v. *Coleman,* 115 F.2d, pages 305, 306, 307, the Court said:

"To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no circumstantial evidence on it that is either that the tendered evidence is by its nature too incredible to be accepted by reasonable minds or that considering its truth it is without legal probative force. Testing appellant's offer of proof by the rule it plainly appears that an issue on which he is en-

titled to a jury trial has been summarily decmed against him."

We call to the Court's attention the fact that on January 7, 1960, the United States Court of Appeals, Tenth Circuit, in Case No. 6300 styled *A. J. Simler, Petitioner* v. *Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Respondent,* on Petition for Writ of Mandamus, issued its order to the said District Judge to vacate all orders theretofore entered by the said United States District Court denying a jury trial to plaintiff in said cause and submit to a jury for determination all disputed issues of fact arising in such action. This order however contained a provision that it should not be construed as to affecting the right of the District Court to dispose of the action summarily if the court, in the exercise of its sound judicial judgment, determines such disposition to be required or proper in law. Thereafter the United States District Court did sustain a motion for a summary judgment in said cause and that is the appeal that was lodged in the United States Court of Appeals for the Tenth Circuit and that is the case that is pending here on Petition for Rehearing and the question thus presented to the United States Court of Appeals, Tenth Circuit, was whether a summary judgment should have been granted.

We call the Court's attention to the case of *Operators Royalty & Producing Co.* v. *Greene,* 173 Okla. 388, 49 P.2d 499, in which the Court said:

"The evidence being sufficient to carry to the jury the issue of fact as to the existence or non-existence of fraud, the verdict of the jury upon such issue of

fact will not be disturbed by this court, if the issue was submitted to the jury under proper instructions.

" 'When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict.' Illinois Oil Co. v. Pender, 137 Okl. 82, 277 P. 1026, Hall v. Smith, 126 Okl. 206, 259 P. 537."

In *Hope Natural Gas Co.* v. *Ideal Gasoline Co.*, 114 Okla. 30, 243 Pac. 206, Syllabus 2 by the Court is as follows:

"Appeal and error—1002—Fraud—64 (1)—Existence of fraud question for jury; verdict on conflicting evidence will not be disturbed. When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and, upon appeal, the verdict of such jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such findings."

In *Illinois Oil Co. v. Pender, et al.*, 137 Okla. 82, 277 Pac. 1026, Syllabus 1 by the Court is as follows:

"Appeal and error—1001 (1)—Fraud, 64 (1)—Fraud is question of fact for jury; jury's finding on question of fraud will not be disturbed on appeal is supported by evidence.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact

for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the last cited case the officers served as officers in two corporations transacting business with each other and the court instructed the jury that a contract between two corporations effected by votes of directors common to both is presumptively invalid and can only be sustained by an affirmative showing of fairness and good faith.

The Court will note in the *Haunstein* case heretofore cited, that when an attorney deals with his client or contracts with him after the relationship of attorney and client has once been established, is presumptively fraudulent.

In the case of *Hall* v. *Smith*, 126 Okla. 206, 259 Pac. 537, the Supreme Court of Oklahoma said as follows:

"The defendant Murphy, while denying that he represented to the plaintiff that he was bookkeeper for the defendant Hall and had charge of the runs from these wells, denied that he made the representations that said wells were producing four or five barrels per day per well, but admits making the statement and representation that plaintiff could rely implicitly upon what Hall said to him and what Hall told him.

"Under this evidence an issue was created for the jury to pass upon. The jury by its verdict having found against the defendant Murphy, and there being sufficient evidence reasonably tending to support such verdict, this court is bound thereby."

CONCLUSION

The *Southard* case cited in the Petition for Rehearing as we view it, has no application whatsoever to the case at bar.

First: It was a suit to cancel a deed and contract. This is not a suit to cancel a deed and contract but is a suit brought for declaratory judgment to determine whether or not Mr. Simler owes Mr. Conner any additional amount as attorney fees.

Second: This case involves the sustaining of a motion for a summary judgment by the United States District Court for the Western District of the State of Oklahoma.

Third: The plaintiff in the United States District Court case alleged that Mr. Conner practiced actual fraud upon him and also constructive fraud. Mr. Conner denied the allegation which makes a question of fact to be determined by a jury.

Fourth: In the *Southard* case the Supreme Court of Oklahoma cited with approval the *Haunstein* case and the *Haunstein* case has never been overruled or modified by the Supreme Court of the State of Oklahoma. Since the *Haunstein* case is the law in Oklahoma, the letter dated September 25, 1952, is presumptively fraudulent and Mr. Simler testified by deposition and alleged in his complaint and reply to the facts concerning the execution of such second letter. There was absolutely no consideration of any kind for the second letter. If it is fraudulent, either presumptive or actual, it is

void and can confer no rights. This can only be determined by a trial of the case on its merits.

Fifth: The first letter dated July 18, 1952, employing Mr. Conner and agreeing to pay him a reasonable fee is within itself complete and full and a reasonable fee is all Mr. Conner should wish or ask for.

Sixth: The factual situation in the *Southard* case relied on by the petitioner herein is neither identical nor compatible with the factual situation in the *Haunstein* case nor is it the same or similar to the facts in the case at bar, for which reason the rule laid down in the *Southard* case has no application here.

We therefore most respectfully submit to this Honorable Court that the Petition for Rehearing should be denied and the cause tried to a jury as provided by the Constitution of the United States, the Rules of Civil Procedure and the Laws of the State of Oklahoma.

JACK M. HIGHLEY,
Mutual Savings Building,
Oklahoma City, Oklahoma;

JOHN B. OGDEN,
1409 Liberty Bank Building,
Oklahoma City, Oklahoma,

By JOHN B. OGDEN,

Attorneys for Respondent.